SUPREME COURT, U. S.
MAY 27 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974

NO. 74-1354

DUDLEY WIDEMAN, Administrator
of the Estate of Claude Wideman,
Deceased, Petitioner

V.

MISSISSIPPI VALLEY GAS COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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May 28, 1975

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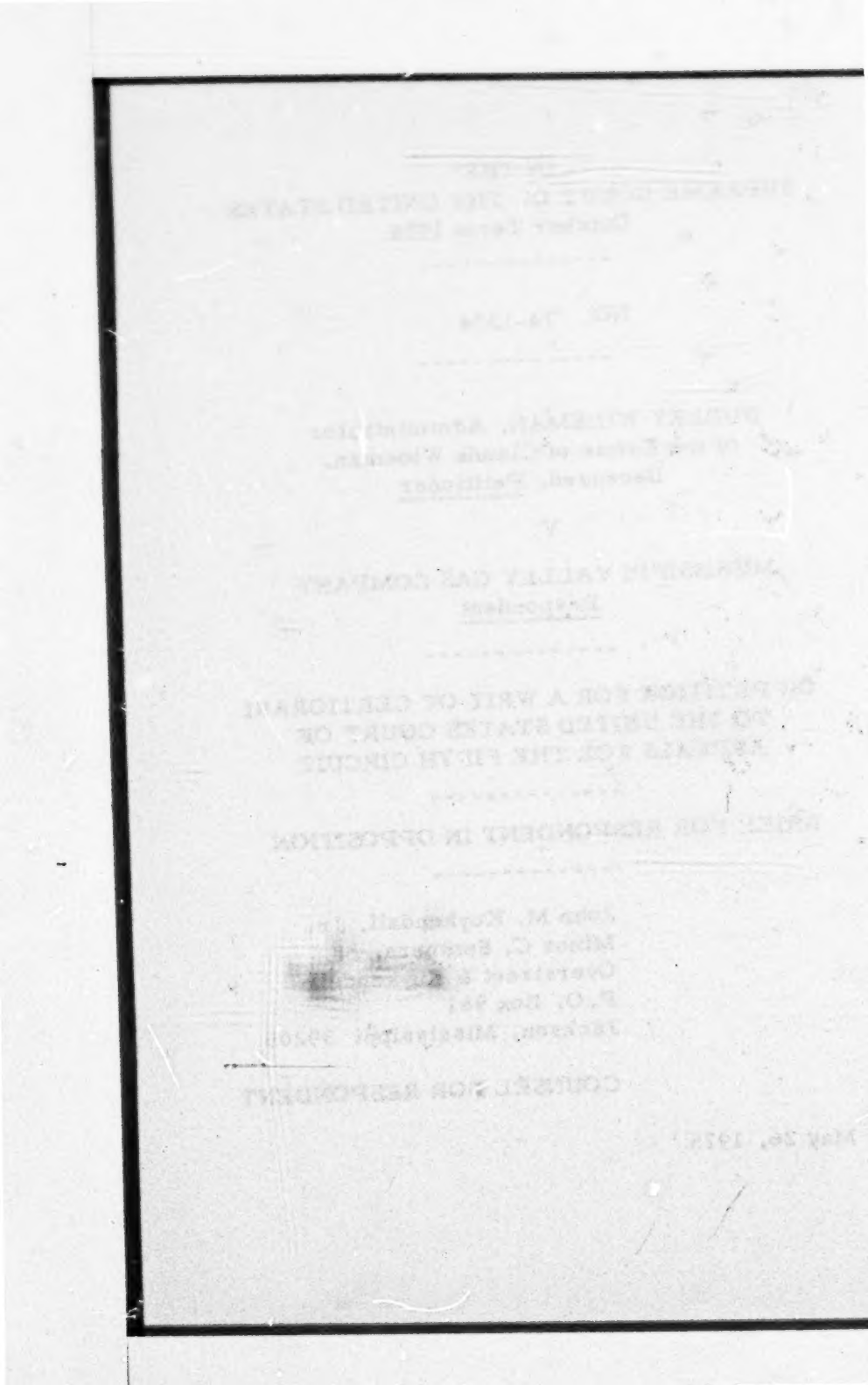
May 26, 1975



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The Respondent, Mississippi Valley Gas Company, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this proceeding be denied.

OPINION BELOW

The opinion of the Court of Appeals appears in 507 F. 2d 658 (5th Cir. 1975) and is appended to the Petition for Writ of Certiorari. No written opinion was rendered by the District Court for the Northern District of Mississippi, but the Court's verbal opinion as dictated into the record appears at page 3, et seq. in the appendix filed in the Fifth Circuit.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The questions presented in the Petition were not raised in the Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent submits that no constitutional provisions are involved or constitutional questions properly before this Court in this case, it

nowhere appearing in the record that such constitutional rights were asserted or claimed violated in the trial court or the Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

The statement of the case set out in the Petition fails to set out the following particulars material to the issue presented:

(1) That one of the grounds presented in Respondent's motion for a directed verdict at conclusion of all testimony for both sides was that the deceased, Claude Wideman, was a trespasser on the valid gas right-of-way easement and that the Company owed no duty to a trespasser. R. 368. In granting the Motion for Judgment Notwithstanding the Verdict (n.o.v.), the Trial Judge held the Court had erred and that the "...correct standard or legal duty under these undisputed circumstances was not the duty

of ordinary care, but only the duty owed to a gratuitous licensee, which is to refrain from willful or wanton injury to the Licensee." (5th Cir. App. 6)

(2) Further, in discussing the instructions requested by the gas company the Court stated:

> "THE COURT: Request Number Eight, I do not believe is good law and I am going to refuse it. I don't think the defense is entitled to that instruction.
>
> "Request Number Nine suggests the grounds previously urged on the Court, that if any surface use was made of that property, then the user would have the status of a trespasser only, and the duty of the gas company -- I understood defense counsel to say earlier that the standard of ordinary care controlled in this case. I believe that was the answer given to the Reporter at the conclusion of the plaintiff's testimony.
>
> "MR. HOLLAND: If the Court please --

"THE COURT: Be that as it may, I won't hold you to it. I'm going to refuse Request Number Nine. I do think it is the standard of ordinary care and not the standard only to a trespasser." R. 373, 374.

ARGUMENT

POINT I

The Petition sets out questions not raised in the Court of Appeals.

The questions of whether Petitioner was denied his Seventh Amendment right to a trial by jury by the granting of a judgment n.o.v. to Respondent or whether Petitioner was denied due process of law by the granting of the judgment n.o.v. adopting as the basis therefor a different rule of law from that under which the case was tried were not presented in the Court of Appeals.

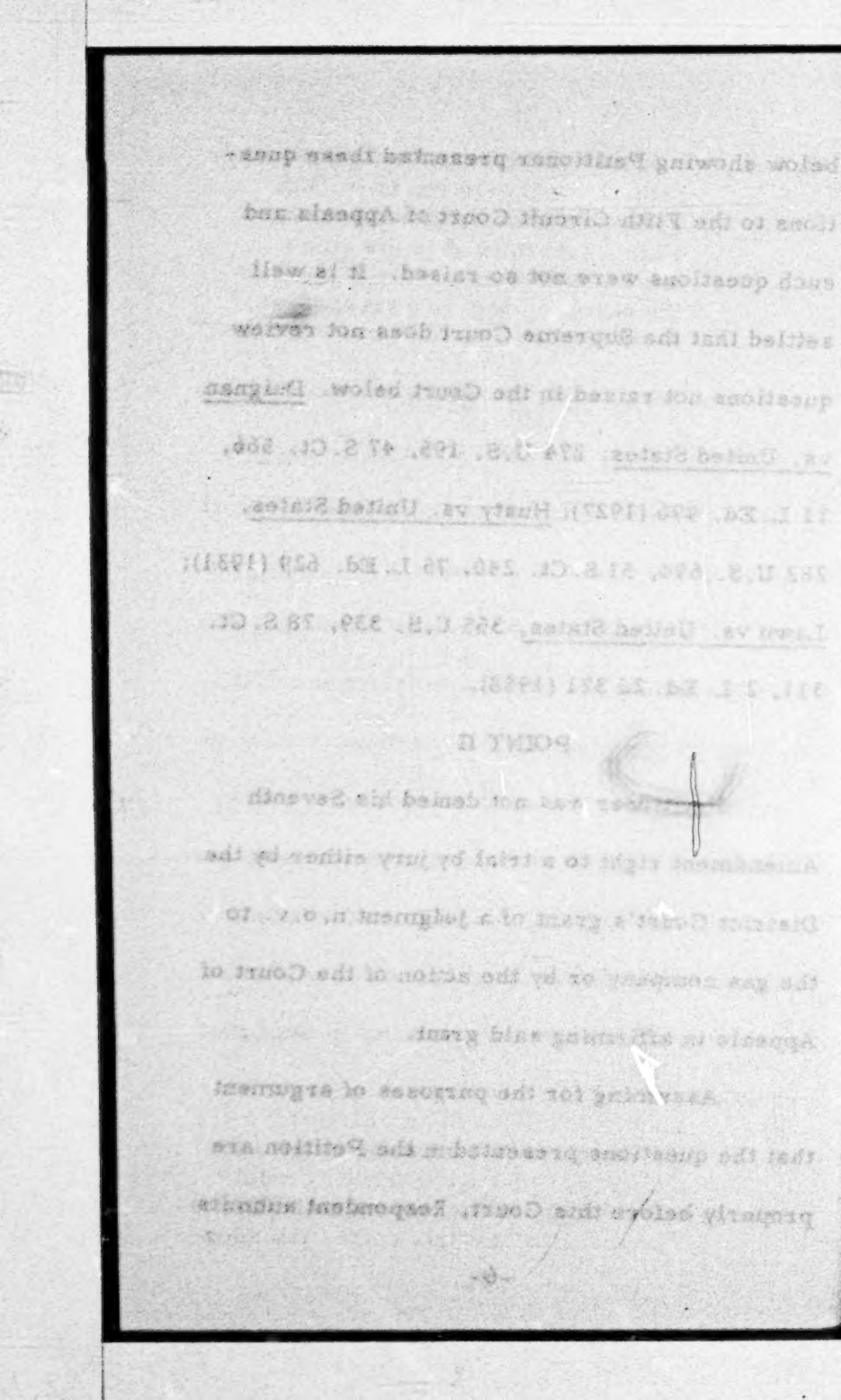
The Petitioner's statement of the case fails to cite any part of the record in the Court

below showing Petitioner presented these questions to the Fifth Circuit Court of Appeals and such questions were not so raised. It is well settled that the Supreme Court does not review questions not raised in the Court below. Duignan vs. United States, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927); Husty vs. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931); Lawn vs. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed. 2d 321 (1958).

POINT II

Petitioner was not denied his Seventh Amendment right to a trial by jury either by the District Court's grant of a judgment n.o.v. to the gas company or by the action of the Court of Appeals in affirming said grant.

Assuming for the purposes of argument that the questions presented in the Petition are properly before this Court, Respondent submits



that there is no merit to the question of whether Petitioner was denied his Seventh Amendment right to a trial by jury.

It is well settled that the granting of a judgment n.o.v. does not infringe on the Seventh Amendment right to a trial by jury. Moore's Federal Practice, Vol. 5A, Section 50.07 (1) at page 2354, contains the following in this regard:

> "Even in the absence of a flat holding by the Supreme Court, the constitutionality of the procedure sanctioned by Rule 50(b) can not be doubted. ***"

In Manaia vs. Potomac Electric Power Co., 268 F.2d 793, 798-99 (4th Cir. 1959), cert. denied, 361 U.S. 913, 80 S.Ct. 255, 4 L.Ed.2d 183, the Court stated:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds

anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences.

"Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. The District Court, here, however, was conscious of the limitations of its power, and conscientious and

objective in its exercise. Citing Burcham v. J.P. Stevens & Co., 4 Cir., 209 F.2d 35, he approached the problem 'in the light of the admonition of the Court of Appeals of this Circuit as to the limited authority of trial judges to disturb jury verdicts,' as do we. [163 F. supp. 672.] Even the plaintiffs describe his approach as 'fair-minded.' The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this. See the opinion of Mr. Justice Frankfurter in Dick v. New York Life Insurance Co., 359 U.S. 437, 79 S.Ct. 921, 3 L. Ed. 2d 935; Smith v. Reinauer Oil Transport, Inc., 1 Cir., 256 F. 2d 646."

Petitioner attempts to rewrite Judge Roney's opinion for the Fifth Circuit by claiming it was grounded on Boeing Company v. Shipman, 411 F. 2d 365 (5th Cir. 1969), a case not mentioned in the decision, and arguing the question of "whether in diversity cases, Federal Courts should apply a federal rather than a state test for the sufficiency of evidence necessary to

create a jury question, and what the proper test is, in relation thereto, in connection with motions for a directed verdict and for judgment n. o. v." Petitioner asserts that the Fifth Circuit has decided these issues in a way which conflicts with the decisions of this Court and with the decisions of other Courts of Appeals. Again, Respondent submits that these issues were not raised or argued in the court below and should not be considered here and further that these questions are not fairly comprised in the question presented for review.

Respondent submits that there is no merit to the position of Petitioner, if the questions raised be properly before this Court for consideration.

Respondent submits that whether a state test or a federal test was applied would have made no difference in the decision reached in

this case. The Mississippi Supreme Court, in the case of Butler v. Crestman, Miss., 264 So. 2d 812 (1972) stated the test as follows:

> "In this state all questions of negligence and contributory negligence are determined by the jury. Miss. Code 1942 Ann. § 1455 (1956). The rule relating to the propriety of granting a directed verdict or peremptory instruction has been announced many times by this Court. We said in Mock v. Natchez Garden Club, 230 Miss. 377, 382, 92 So. 2d 562, 563 (1957):
>
> "[T]hat if reasonable men might have a difference of opinion as to whether or not the negligence of the actor constituted a substantial factor in bringing about the injury, then the question is for the jury. We have also held repeatedly in cases too numerous to mention that upon a motion for a directed verdict all the facts expressly testified to, and all inferences necessarily and logically to be deduced therefrom, are to be taken as true in favor of the party against whom the motion is asked, and that a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly

taken of the facts which the evidence tends to establish, and further that if more than one reasonable inference can be drawn from the facts the question of negligence is for the jury.***"

Respondent submits that there is no difference in this test and the test applied by the District Court and the Court of Appeals in this case.

Further, Petitioner's argument is not based on whether a state or federal test should be applied. He adopts the view that a federal test should be applied and the real issue he then presents is whether this test should be the FELA (Federal Employer's Liability Act) test in all cases, statutory and non-statutory. In the Boeing case, supra (411 F.2d 365) the Fifth Circuit states:

"Although the Supreme Court has not answered the question of law, no Circuit Court of the United States, other than the Fifth Circuit, has held that the

FELA test of sufficiency of evidence is applicable in non-FELA cases. The First Circuit expressly rejected the FELA standard in Dehydrating Process Co. v. A.O. Smith Corp., 1 Cir., 1961, 292 F.2d 653, 656 n. 6, stating that such cases had to be considered 'on their own bottom,' and the Court further said, 'We do not appear to have considered this question ourselves, but a number of other circuits have reached this result without even discussion.' [Citing, inter alia, Rhodes v. Metropolitan Life Insurance Co., 5 Cir. 1949, 172 F.2d 183, cert. denied, 337 U.S. 930, 69 S.Ct. 1495, 93 L.Ed. 1738.] See Gibson v. Elgin, Joliet & Eastern Railway Company, 7 Cir., 1957, 246 F.2d 834 (On Petition for Rehearing); Cahill v. New York, New Haven & Hartford R.R. Co., 2 Cir. 1955, 224 F.2d 637 (Frank J., dissenting).

"Finally, the Seventh Amendment of the United States Constitution providing for trial by jury does not require, either expressly or impliedly, that the test of sufficiency of evidence to create a jury question in a non-FELA federal case be the same as in an FELA case. The tendency of some federal courts, at times, to use overly broad language or to cite indiscriminately

FELA cases in non-FELA situations does not obviate this conclusion. See, e.g. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-701, 82 S.Ct. 1404, 1411, 8 L.Ed.2d 777 (1962); Harris v. Pennsylvania Railroad Co., 361 U.S. 15, 16, 80 S.Ct. 22, 23, 4 L.Ed.2d 1 (1959) (Mr. Justice Douglas, concurring); Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 3 Cir., 1963, 325 F.2d 2, 22.

"The standard provided by the Supreme Court and Circuit Courts in FELA cases for sufficiency of evidence to create a jury question is proper under the Federal Employers' Liability Act, and with this we do not disagree. But in non-FELA federal cases which are not based on statute, the formulation of the test of sufficiency of evidence is substantially different."

The Fifth Circuit, rejecting its earlier decision, then set forth what the proper test should be in determining whether to submit a case to the jury in connection with motions for a directed verdict in federal court and stated the following to be the correct test:

"On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder

of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

The District Court's judgment n.o.v. and the Court of Appeals' judgment affirming it meet the requirements of both the state and federal tests on the question of the sufficiency of the evidence to require submission of a case to the jury and there is no conflict among circuits or with the decisions of this Court on this question. We submit that the test announced by this Court in Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), an FELA case, is for use in an FELA case, as the Fifth Circuit ruled in the Boeing case and as has been held in other cases. Missouri-Kansas-Texas Railway Co. v. Hearson, 422 F.2d 1037 (10th Cir. 1970), Gibson v. Elgin, Joliet & Eastern Railway Company, 246 F.2d 834 (7th Cir. 1957) cert. den. 78 S.Ct. 270, 355 U.S. 897, 2 L.Ed.2d 193, but this question of law is not an issue in this case.

This Court has indicated that the test announced in Lavender v. Kurn is confined to such statutory negligence actions as FELA cases. Rogers v. Missouri Pac. R. Co., 77 S.Ct. 443, 352 U.S. 500, 1 L.Ed.2d 493 (1957). In that case, it is stated that:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. ***"

POINT III

Petitioner was not denied due process of law when after trial and jury verdict in his favor, the District Court reversed itself and granted the Defendant gas company a judgment n.o.v. adopting as its basis therefor a different rule of law from that under which the case was tried.

Again Respondent submits that this question was not presented or argued in the Court

below and this is not properly before this Court for consideration.

However, answering Petitioner's argument thereon, Respondent submits that Petitioner misapplies the cases he cites on the principle that failure to object bars later challenge to an instruction.

The Court of Appeals for the Fifth Circuit pointed out in a footnote to Gorsalitz v. Olin Mathieson Chemical Corporation, 429 F.2d 1033, 1040 (5th Cir. 1970) as follows:

> "We have considered treating the test prescribed in the court's instruction to the jury as the law of the case under our decision in Green v. American Tobacco Co., 5 Cir. 1963, 325 F.2d 673, 676. However, we do not stop with that test, because we have some doubt as to the applicability of our holding in Green under the facts of the instant case in the light of the well-reasoned decisions of the Eighth Circuit that an instruction to which no objection or only a general objection has been taken does not

> become the law of the case for the purpose of reviewing an order denying a motion for the direction of a verdict. ***"

Wright & Miller, Federal Practice and Procedure, Vol. 9, Sec. 2558, p. 670, 671 (1971) points out:

> "Many decisions say that an instruction not objected to becomes the law of the case. This may be merely one way of phrasing the general principle that failure to object ordinarily bars later challenge to an instruction. It appears to have no meaning beyond that."

At the close of all the evidence, Defendant gas company made a motion for a directed verdict, one of the grounds therefor being that the decedent was a trespasser and no duty was owed him by the gas company. R. 368. The gas company also requested the Court to instruct by its instruction number 9 that the only duty owed was not to injure Wideman willfully, wantonly or through gross negligence, which

was refused. R. 373, 374. Petitioner's position that the later granting of a judgment n.o.v. was a violation of Petitioner's Fifth and Seventh Amendment rights based on "law of the case" arguments is without merit. In Central Steel Tube Co. v. Herzog, 203 Fed.2d 544 (8th Cir. 1953) the court held that the defendant was entitled to have the question of sufficiency of the evidence to go to the jury determined by the applicable law without reference to the instructions given by the court even though the instructions may not have been excepted to by the defendant.

In Coca Cola Bottling Co. of Black Hills v. Hubbard, 203 F.2d 859 (8th Cit. 1953) the following is stated at page 861, 862:

> "The plaintiff asserts that, since no exceptions were taken to the instructions of the court, they became the law of the case for determining the sufficiency of the evidence to support the verdict and judgment, citing Carter Carburetor Corp. v.

Riley, 8 Cir., 186 F.2d 148. The plaintiff's statement, which finds support in many opinions of this Court, is an erroneous statement of the law, and is now expressly disapproved and overruled.

"It is true, of course, that an appellant may not challenge on review the correctness of instructions to which he took no exceptions or only a general exception. Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A.; Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.Ed. 645 and cases cited; Plamer v. Miller, 8 Cir., 145 F.2d 926, 930. In that sense, and in that sense only, it may be said that the instructions to which no exceptions are taken become the law of the case for determining whether the instructions are subject to review on appeal. See Union Pacific Railroad Co. v. Denver-Chicago Trucking Co., Inc., 8 Cir., 202 F.2d 31, 37-38. But in determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions. This Court must ascertain for itself what the applicable law is, whether

> the instructions were excepted to or not. A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury. In Slocum v. New York Life Insurance Co., 228 U.S. 364, 369-370, 33 S.Ct. 523, 526, 57 L.Ed. 879, it was said that a ruling on a motion for a directed verdict 'is subject to re-examination and approval or disapproval on writ of error in like circumstances and in like manner as are other rulings in matter of law during the course of the trial.' ***"

Respondent submits that the Court of Appeals has not departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision in its affirming of the grant of the judgment n.o.v. herein.

CONCLUSION

For the reasons stated above, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of May, 1975, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to Joe H. Daniel, Esq., 405 Tombigbee Street, P.O. Box 1084, Jackson, Mississippi 39205, Counsel for Petitioner. I further certify that all parties required to be served have been served.

Minor C Sumners Jr.

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